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STB Ex-Parte No. 690

TWENTY-FIVE YEARS OF RAIL BANKING: A REVIEW AND LOOK AHEAD

Written Testimony of: The National Association of Reversionary Property Owners (NARPO)

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The National Association of Reversionary Property Owners (NARPO) is a non-profit organization formed in 1987 to educate and help property owners affected by the Trails Act, 16 U.S.C. 1247(d). See NARPO's web site at: http://home.earthlink.net/~dick156

NARPO estimates that over 200,000 property owners are affected by the Trails Act. The Surface Transportation Board (STB) should administer the Trails Act fairly and justly to protect these private interests while meeting its other obligations under the Act. Private interests are at stake because much of our railway system in this country consists of easements limited to railroad purposes. Before the Trails Act was passed, these easements would be extinguished and full rights would be restored to homeowners, farmers, and other landowners, as had been done for over a century. But as explained by the United States Supreme Court in *Preseault v. ICC*, 494 U.S. 1 (1990), when the Trails Act was passed, this automatic reversion under state law was defeated, giving rise to a claim for a federal taking of private property, as protected under the United States Constitution. Because Congress and the STB as a whole failed to grasp the effect the Trails Act would have on hundreds of thousands of property owners abutting railroad rights of way (ROW), rulemaking for these interests were not included. But the STB has since become aware of the myriad of concerns and confusion that has arisen due to the problems and difficulties facing landowners. Accordingly, it is time that the STB act to implement rules which seek to resolve these problems.[1]

In the 25 years of the Trails Act, approximately 1,400 rail lines have been approved for abandonment by the Interstate Commerce Commission (ICC) and STB. Over 1,200 of those abandoned rail lines have been subject to a Certificate of Interim Trail Use or Abandonment order (CITU) or Notice of Interim Trail Use or Abandonment order (NITU) (hereinafter collectively "NITU"). It is unclear how many of these NITUs have actually resulted in a Trail Use Agreement, as consummated by the abandoning railroad and the trail entity. The STB has no rule in place that requires the STB or the public be notified when a Trail Use Agreement has been consummated. Nor does the STB track the number of Trail Use Agreements consummated annually, as had been done historically by the ICC. Even if a Trail Use Agreement has been signed, neither the STB nor the public will know if the trail was

[1] NARPO submits the STB is already empowered to implement the rulemaking NARPO proposes, as set out below. But to the extent the STB maintains it has no authority to act, it should seek the necessary authority from Congress

actually built or whether the ROW is being maintained in a reasonable fashion.

Indeed, from NARPO's 22-year experience, there are hundreds of rail lines which have been abandoned and have resulted in Trail Use Agreements, but which have never been maintained as trails. The ROWs are just sitting there as linear blights, grown over with trees and weeds, collecting debris, and are generally noxious and unsafe for the abutting property owners. The abutting property owners cannot do anything to disturb or clean up the ROW in those instances because they have lost their property interest in controlling the ROW. In most cases the abutting property owners don't even know whether there is a trail manager, who the trail manager is, or how to contact the manager if one exists in order to remedy the problem. Worse, in many cases there is no trail manager because the trail group is defunct.

The 1,400 abandonments in the past 25 years comprise about 20,000 miles of rail line. The Trails Act was ostensibly implemented in order to "railbank" corridors for future railroad use. After a quarter of a century since the enactment of the Trails Act, NARPO is aware of only four rail lines that have been reinstated to rail service (although according to the STB in its notice for this hearing, there are nine rail lines with reinstated rail service). The four reinstated rail lines known to NARPO comprises 25 miles of track. Assuming, therefore, a doubling of that figure, there are now approximately 50 miles of reinstated rail line. Thus, with "railbanking" for future use being the objective, and with only 50 miles of rail line reinstated, the federal treasury and various federal agencies have expended over a billion dollars for, to-date, these 50 miles. This is so because untold millions of dollars have been paid to compensate the abutting property owners and their attorneys who have sued the federal government for just compensation for the taking of their property. (And yet only a small fraction of the property owners abutting these 200,000 miles of rail line have exercised their rights by suing the federal government through the United States Court of Federal Claims (Claims Court). This paucity of lawsuits is no doubt in part due to the expensive price-tag for suing the federal government—no ordinary landowner can afford it and there is only a handful of lawyers in the country who are able or willing to press their claims—and in part due to the lack of notice that their rights have been affected. In many cases the statute of limitations may have run before property owners knew what happened to them.) Moreover, as explained below, approximately a billion dollars in tax revenue have been spent on funding the "railbanking" itself.

A. The Railroad Industry's and Trail Proponents' Gains Extract Great Costs From Adjacent Landowners and the Tax-paying Public.

Who are the winners of the past 25 years of the Trails Act?
The railroads are the big winners! The railroads are allowed to get rid of rail lines they deem unprofitable. The railroads are allowed to sell ROWs they do not own for trail purposes. The railroads have been claiming corporate charitable tax deductions for value in the ROWs even for the large parts they do not own as fee interests. The railroads, if by chance an opportunity arises, can later reinstate rail service over the abandoned line.

Who are the other winners in the past 25 years of the Trails Act?
The trail proponents. Over $20 million has been spent by U.S. taxpayers for compensating

landowners for damages and their attorney fees. And the U.S. taxpayer has picked up the tab for about $1 billion that has been spent from the federal gas tax to build bike trails since 1991.

Who are the losers of the Trails Act?

200,000 property owners have lost their property rights to these 1,200 ROWs while fewer than 1 in 500 have had the resources or know-how to seek just compensation for their loss. It took Mr. Paul Preseault 24 years to get through the U.S. Federal court system and the Court of Claims—from 1980 to 2004—before he got his "just compensation" which consisted of $1.3 million in attorney fees and $238,000 compensation plus interest for his 1,200 feet of ROW.

Not only have so many suffered these losses without receiving just compensation, there are many instances where property values have decreased because of the proximity of the trail. Professor Noelwah Netusil of Reed College in Portland, Oregon was requested by the City of Portland, Oregon to do a study on residential property values that are next to or near governmental amenities. The results of the study "The Effects of Environmental Zoning and Amenities on Property Values: Portland, Oregon," *Land Economics*-May 2004-81 (2)·227-246, show that property values next to trails and cemeteries indicate a 5.4% yearly decrease in property value due to the noise, crime and loss of privacy caused by the trail. NARPO has done a study on a trail built in 1978 on an abandoned ROW in Seattle, Washington. NARPO surveyed the county tax records for the 303 properties along the ROW in 1979, 1989, 1999 and 2008. The study showed the properties abutting the trail (the properties border Lake Washington) dropped in value the first 10 years and never caught up to the values of other, like-properties along the lake or other nearby urban lakes. See the two links below for the study: http://home.earthlink.net/~dick156/burkegilman.pdf and http://home.earthlink.net/~dick156/bg-study.doc

These studies, and others like them, negate the fallacy that trails increase property values. To be sure, having trails in the general neighborhood may be considered beneficial by the market. But that is a far cry from having a trail running through your backyard or through your farm. From both studies it may be discerned that while properties a distance away may increase in value, the abutting properties do not: they lose value.

Who are yet other losers in this 25 year history of the Trails Act?

Individuals and homeowners are vulnerable to attack from criminals using the trails: NARPO knows of 1,200 individuals who have been raped, robbed or murdered on these trails since 1990, and the actual victims are likely exponentially higher in numbers than those known to NARPO. The majority of the victims have been women and children. The facts show 95% of those harmed by criminal users of the trails have been women, 4% were children and 1% were men. The women students of the University of Connecticut call the rail-trail next to the University the "RAPE TRAIL" because so many rapes have occurred on the trail; see http://feministgal.blogspot.com/2008/05/uconns-rape-trail-earns-its-name.html and HYPERLINK "http://www.redroom.com/articlestory/the-rape-trail-america-doesnt-get-it" http://www.redroom.com/articlestory/the-rape-trail-america-doesnt-get-it

There are websites available that advertise the best trail to hang out on to engage in sex, due to the lack of law enforcement and dark places in which to remain hidden. (See http://listings.cruisingforsex.com/cfs/index.php?file=h, ***note that this website is sexually graphic and thus may be unsuitable for viewing.***)

Many homeowners feel vulnerable with homes next to trails that are screened from view by the public and thus serve as conduits for sometimes fatal crimes. **The following describes the result of a typical rail-trail crime which resulted in a woman being murdered:** "Prosecutors describe it as a random crime of opportunity:

Nathan Anderson was walking along the Monon Trail, saw an open window of an apartment and climbed in to steal money, according to prosecutors." See the news article at: Printable=ClientType&10095338=s?asp.story/global/com.wthr.www//:http

Another way the citizens who own land along these rail lines lose out is the adversarial approach the Department of Justice employs in litigating these cases. While the federal courts have made clear in cases like *Preseault,* 100 F.3d 1525 (Fed. Cir. 1996), and *Toews v. United States,* 376 F.3d 1371 (Fed. Cir. 2004), that the federal government owes these property owners "just compensation," in each case brought by property owners to enforce their right to just compensation the DOJ continues to challenge these rulings and argues for every possible loophole and technicality to avoid paying these landowners their Fifth Amendment "just compensation." DOJ forces the landowners to litigate areas of well-settled law, often delaying resolution of these landowners' cases for years. DOJ is pursuing costly litigation strategy that delays landowner compensation and substantially increases expense to taxpayers. During hearings on Capitol Hill, Sen. Burr commented on the DOJ's litigation strategy:

> I hope you would take back to the individuals at the Justice Department that made this determination, that I take very seriously a taking. I think that when someone's land is taken there has to be compensation for that . . . If for some reason we found a technical reason to run the clock out [under a statute of limitations argument] and now the position of Justice is, "oops, so sorry. You missed out on compensation." That's not the American way.[2]

The DOJ's tactics frustrate landowners' right to compensation by causing the landowners' only route of recourse – filing a lawsuit against the federal government – to be a costly and time-consuming procedure. In a case currently pending in the United States Court of Appeals for the Federal Circuit, the DOJ is arguing to eliminate the class action procedure in the Court of Federal Claims. *See Fauvergue v. United States*, 2009-5048. The DOJ's argument seeks yet again to prohibit landowners from having an efficient and economical path to redress their claims for compensation. Instead, landowners will have to bring their suits individually, drastically increasing the cost of bringing a claim while dramatically narrowing the time in which to bring it. Such a result is anathema to the goals and purpose of the Justice Department and the Trails Act.

Who are the other losers of the Trails Act?

The U.S taxpayers have paid over a billion dollars in revenues and will continue to pay more. As mentioned earlier, millions of dollars have been spent and will continue to be spent in compensating landowners for their loss in Claims Court adjudications. Over a billion dollars of federal gas tax have been spent on bike trails since 1991; this money should have instead been dedicated to fixing the roads and bridges that are decaying throughout the United States; see: http://coburn.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=baa16381-4374-42bc-a1a6-14500274f120

Meanwhile, while taxpayers bear the burden, railroads reap huge tax savings, by claiming donations of

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[2] See Subcommittee on National Parks Hearing (April 23, 2008). *Available at* *http://energy.senate.gov.public/index.cfm?FuseAction=Hearings.Hearing&HearingID52b74f78-a8ae-3828-9f86-b5249ed1f624* (last visited June 29, 2009).

abandoned railroad ROWs for corporate charitable tax deductions. This is so despite the IRS having rules against taking deductions for donating property where no ownership interests exist. The New York Times described just such an instance where Union Pacific Railroad was called to account for its tax deduction practices. See article at, http://query.nytimes.com/search/article-printpage.html?res=9F0DE3DD103CF934A3575BC0A9629C8B63

Likewise, Burlington Northern Santa Fe (BNSF) was also caught by the IRS when a taxpayer reported BNSF as taking an illegal charitable corporate tax deduction for over $41 million on a ROW donation. In AB 6-380X, BNSF made a filing with the STB in 1998 in regards to a challenge to the value of the ROW in the abandonment. In this filing (it is not available on the STB web site), BNSF declared that they had already taken a charitable corporate tax deduction for 1997 for $41 million on the 12 mile ROW. Soon after a taxpayer notified the IRS that BNSF had taken an illegal tax deduction. The IRS challenged BNSF and BNSF then withdrew the tax deduction. Under 26 U.S.C. 170(a) et seq., and I.R.S. Tax Regulations 26, section 1.170A-7(a)(3), taxpayers (railroads) cannot take a tax deduction unless they convey full title and have no remaining interest in the property. In the case of Trails Act ROWs, the railroad must retain an interest in the ROW otherwise the Trails Act preemption would not be in effect. See also, IRS Tax Advisory Memo 06-10-017, March 3, 2006, and IRS Letter Ruling 200610017, November 25, 2005.

Disturbingly, the STB and trail sponsors—which include governmental bodies—appear to be complicit in permitting the railroads to facilitate these tax-dodging schemes to the tune of millions of dollars of losses to the public. On the above trail, in King County, Washington, the BNSF deducted $41 million on a "donation" which netted BNSF $15.6 million in non-payment of taxes. In this case, King County, the trail group entity, understood that BNSF *had virtually no actual ownership* title to any of the ROW, as King County had already done a title search which showed all but 1200 feet of the ROW was reversionary. Further, BNSF retained Arthur Anderson to conduct an appraisal of the ROW for tax deduction purposes, but told Arthur Anderson to consider all the ROW to be fee title land, despite BNSF's understanding from its real estate division that the land was reversionary. Knowing all this, King County nonetheless gave a donation letter to BNSF for $41 million.

B. What Can the STB Do to Make the Trails Act Fair and Just for the Adjacent Property Owners and the U.S. Taxpayers?

1. Notification of the Abandonment process -- The STB can readily implement a rulemaking where it requires the abandoning railroad, or the trails group requesting the NITU, to notify every property owner along the ROW in question of the proceedings. The STB has resisted this avenue before, but with the overwhelming evidence that the property owners are not getting notified of the takings action, the STB can make the case now for due process notification. With modern county property ownership records easily available, the time and cost to effectuate proper due process notification would be minimal. The trails groups have also resisted due process notification in the past because they did not want the property owners to know in advance that the trails group intended to use their property for trail use. While this rationale may be strategic for the trail sponsors, it is manifestly unacceptable and due notice must be given.

The need for a due process notification rule has become even more imperative since the United States Court of Appeals for the Federal Circuit has held that the date the NITU or CITU is issued by the STB is the date that starts the statute of limitations running for filing a takings case for just compensation of a ROW taking. Many times it is years from the issuance of a NITU before the property owner finds out the railroad has abandoned the line and that the Trails Act has been triggered. See *Caldwell v. U.S.*, 391 F.3d 1226 (Fed.Cir. 2004) and URL mailbox:///c|/documents%20and%20settings/compaq_owner/application%20data/mozilla/profiles/default/eyj8x8zo.slt/Mail/pop.earthlink.net/Inbox?number=407095481&part=1.2&type=application/pdf&filename=Caldwell.2004.FedCir.pdf

In short, the STB already requires notification to several interested parties of these proceedings; adjacent landowners should be included in this group.

2. Notification of consummation of the Trail Use Agreement -- The STB should require the trails group to notify the STB when a Trail Use Agreement has been signed by both parties. The requirement places virtually no burden on a trail manager and would provide critical information to the STB and public concerning the status of the ROW at issue. Without that information, neither the STB nor the public has any way of knowing whether the potential for a trail use has resulted in actual trail use. *Included in this requirement would be a request for the contact information for the trail manager, and the requirement that if the trail group becomes defunct, that the STB be notified of this change in status.*

3. Limit 180-day extensions to avoid unreasonable delay -- The STB should limit the number of 180-day extensions for reaching a Trail Use Agreement. NARPO proposes the STB limit extensions to four, which would allow for a reasonable period of time—two years—to achieve a Trail Use Agreement. NARPO has reviewed the previous four years of STB records on extensions for Trail Use and found over 40 NITUs that have at least four years of extensions, 11 NITUs with over seven years of extensions, and one, AB 471X, that was issued in 1997 and which still does not have a Trail Use Agreement and where the NITU has changed hands three times.

4. Notice of source of railroad interests – If a NITU is issued, the STB should require the railroads to file with the STB a copy of its "Valuation Maps" and accompanying "Lands Owned and Used" Schedule that applies to the subject ROW and which were filed with the Interstate Commerce Commission in the early 1900's. As the STB is aware, those Maps and Schedule list each parcel the railroad originally acquired when constructing the subject line, and list the source of its interests. Included in that information will be where each ROW conveyance deed is recorded in each county and state. The STB already requires the abandoning railroad to state in the abandonment application whether the rail line has federally granted right of way; the railroad must consult these documents to answer that question, so it should be no undue burden on the railroad companies to attach these documents that are in their possession and/or that are readily available to them from the federal archives, where they are stored. Additionally, if the railroad company does take a tax write-off for a donation, then it should be required to file with the STB the basis for such write-off, including any appraisal which should specify assumptions concerning the percentage of ownership in fee simple title versus ownership of merely easement interests, and any documentation that was used to reach such assumptions.

5. Provide a simple process for seeking relief from derelict trail managers --The STB should provide a process whereby citizens could notify the STB that a ROW has become a blight or a safety issue, and where the STB will informally attempt to remedy the problem but, if still unresolved, will expressly decree the matter to be a local issue, so that a landowner has a clear recourse. NARPO understands the STB believes it has no jurisdiction to provide a remedy when a landowner complains a trail manager is derelict in its duty, but NARPO submits the current procedural posture is untenable and that the STB *does* have the power to implement a two-pronged process of (1) attempting an informal resolution, and (2) expressly declaring the matter a local issue if an informal process fails. NARPO receives scores of complaints annually, where landowners inform NARPO of their inability to find relief from the blight of unmanaged trails or where other grievances against a trail manager has arisen. In too many instances, landowners have found that *both* the STB *and* their local jurisdictions deny they have the jurisdiction to handle the problem. As is obvious, this situation results in an intolerable Catch-22 where the landowners expend resources in fees and court costs which they can barely afford, only to be told that they have no recourse.

The STB should provide a simple process (without the need for an attorney) with step-by-step instructions, whereby (a) landowners can file a complaint with the STB for a trail manager's failure to satisfy its obligations under the Trails Act on Trail X, (b) the STB briefly investigates the problem and notifies the trail manager of the complaint (see proposed rule, Number 3, above, requiring contact information for the trail manager), (c) requests the trail manager remedy the problem within 30 days, and (d) if the STB's informal notice goes unheeded or is otherwise unresolved, then within a defined period of time, the landowner can request the STB issue a Statement of Non-Jurisdiction, whereby the STB would issue an express statement that it has no formal jurisdiction over the matter and that any failure of the trail manager to meet its obligations for the management of Trail X is a matter for the local courts, applying applicable local laws.

In conclusion, NARPO wishes to thank the STB for the opportunity to provide its Testimony in this hearing. NARPO hopes that through this process the STB will implement the rulemaking that is within its power, and that is long overdue, to protect the hundreds of thousands of property owners who happen to own land under and/or next to a railroad right of way and whose rights have been denied, ignored, and in some cases outright abused. NARPO also hopes that by calling attention to the applicable tax laws, and the circumventing of those laws in some of the rails-to-trails conversions, that efforts will be made to curtail future tax abuses. Further, NARPO submits that requiring the railroads to file support for tax write-offs on fee-ownership claims would be consistent with the traditional requirement in abandonment filings, whereby railroads were to state the percentage of lands actually owned in the ROWs; this requirement would provide much-needed transparency on this issue.

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